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No. 82-1401
IN THE

Supreme Court of the United States

October Term, 1982

IAIN CALDER and JOHN SOUTH,

Appellants,

vs.

SHIRLEY JONES and MARTY INGELS,

Appellees.

On Appeal from the California Court of Appeal, Second Appellate District.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM FOR LACK OF JURISDICTION AND SUBSTANTIAL FEDERAL QUESTION.

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MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM FOR LACK OF JURISDICTION AND SUBSTANTIAL FEDERAL QUESTION.

Shirley Jones ("Jones") and Marty Ingels ("Ingels"), collectively "Appellees", move pursuant to Rule 16 to dismiss Iain Calder's ("Calder") and John South's ("South") "Statement As To Jurisdiction" ("Statement") for want of jurisdiction on this appeal and failure to present a substantial federal question.

Alternatively, Appellees move that the decision of the California Court of Appeal, Second Appellate District, be affirmed as presenting no substantial issue requiring further argument or consideration and, regardless of the resolution of the issues presented below, there is no unfairness under the facts presented in subjecting Appellants to jurisdiction.

Appellees further request that in the event this Court considers Appellants' statement as a Petition for Certiorari, pursuant to 28 U.S.C. 2103, that it consider this motion in opposition thereto and deny such petition for failure to demonstrate any significant conflict of authority.

I.
THIS MATTER IS NOT WITHIN THIS COURT'S APPELLATE JURISDICTION.

Appellants seek to assert jurisdiction in this Court based upon 28 U.S.C. §1257(2) (Statement, p. 2), which provides jurisdiction:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity."

Appellants argue erroneously that this case requires an examination of the validity of California's "long arm" statute, Code of Civil Procedure §410.10 (Statement, p. 2), which provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

However, the clear language of this statute reveals that it is impossible for it to be either unconstitutional on its face or as applied, since it defines California's jurisdiction as coextensive with that permitted by the Federal Constitution as interpreted by the decisions of this Court. The question resolved below was whether, based upon their tortious conduct towards Appellees, the assertion of jurisdiction by California over Appellants was permissible under the due process clause of the United States Constitution.

In *Kulko v. Superior Court*, 436 U.S. 84, 90 n.4 (1977), this Court dealt with the identical statute asserted at bar, and stated as follows:

> ". . . this case was improperly brought to this Court as an appeal, since no state statute was 'drawn in question. . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States,' 28 U.S.C. §1257(2). The jurisdictional statute construed by the California Supreme Court provides that the State's jurisdiction is as broad as the Constitution permits. See n.3, *supra*. Appellant did not argue below that this statute was unconstitutional, but instead ar-

gued that the Due Process Clause of the Fourteenth Amendment precluded the exercise of *in personam* jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction."

A review of the opinion of the California Court of Appeal herein makes clear that it did not purport to determine the constitutionality of CCP §410.10, but merely the requirements of due process as applied to the facts before the trial court. (Statement, Appendix A, Opinion of the Court of Appeal, p. 4a). Accordingly, under *Kulko* appeal to this Court is not proper under 28 U.S.C. §1257(2) and this purported appeal must be dismissed. If, however, the Statement could be construed as a Petition for Certiorari under Rule 17, Appellees submit that at most this Court should consider the Statement as a thinly veiled, unmeritorious petition for certiorari.

II.

THIS COURT'S GRANT OF CERTIORARI IN *KEETON v. HUSTLER MAGAZINE* DOES NOT WARRANT REVIEW OF THIS CASE WHERE NO SUBSTANTIAL FEDERAL QUESTION EXISTS.

Appellants seek to gain this Court's attention by suggestion that this matter is somehow related to *Keeton v. Hustler Magazine, Inc.*, cert. granted, No. 82-485, (January 24, 1983). However, this argument, like Appellants' claim of appellate jurisdiction, is patently meritless.

Other than the fact that *Keeton* is a libel action presenting a personal jurisdiction issue, that case and this case bear no similarity and combining the two cases for hearing will only obscure the clarity of the significant issue *Keeton* presents. A reading of the First Circuit's opinion, 682 F. 2d 33 (1st Cir. 1982)[1] reveals that the issues of a First Amendment jurisdictional preference for the media or employee juris-

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[1]Appellees have not had an opportunity to review the documents filed in this Court in the *Keeton* case.

dictional immunity for wrongful acts done in the course of employment are not even remotely involved in *Keeton*.

The significant issue presented in *Keeton* is whether a state which is not the plaintiff's residence, which was selected exclusively as a forum shopping device to avoid a statute of limitations bar, and which receives less than one percent of the out of state defendant publication's distribution, has in personam jurisdiction over the corporate publisher and an individual California resident who was a principal of that corporation. The Court of Appeals in *Keeton* stated "[t]here is no allegation suggesting that the allegedly defamatory publication was 'aimed exclusively' or primarily at New Hampshire [citation omitted] or that it caused a 'substantial effect' on that state [citations omitted]" at p. 34. In contrast, those are the precise factual allegations and findings presented here.

Appellants' suggestion that the grant of certiorari in *Keeton* warrants the granting of hearing or certiorari at bar and that hearing of the two cases should be scheduled at the same time is inappropriate.

III.
STATEMENT OF FACTS.

Appellants' Statement (pp. 3-5) fails to include many jurisdictionally relevant facts relied upon by the California Court of Appeal and misstates and downplays others. Furthermore, from the lengthy record below, it is significant that Appellants have chosen to provide this Court with only their short, self-serving, attorney prepared affidavits. (Statement, Appendices E and F). Thus a complete statement of the relevant facts before the lower courts is appropriate.

In September of 1979, South, both a writer and reporter for defendant, National Enquirer, Inc. ("Enquirer") (C.T. 55; 143-145)[2] telephoned Appellees at their home in Beverly Hills, California and read to Ingels a virtually identical draft

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[2]All references to "C.T." are to the Clerk's Transcript prepared for and transferred to the California Court of Appeal in this matter which references appear in the briefs filed in the lower court.

of a libelous and defamatory gossip article. (C.T. 171).[3] The headline and content of the article ("Article") make apparent its pernicious intent and capacity. (A copy of the Article is attached as Appendix A hereto).

After leaving the telephone to be physically sick, Ingels returned and denied to South each and every malicious and untrue element of the proposed Article (C.T. 171). Nevertheless, advised of the falsity of the Article, on or about October 9, 1979, the Enquirer published the Article,[4] at the direction of Calder, the editor and president of the Enquirer (C.T. 53), whose duties by his own testimony were, as president, to "oversee just about every function of the Enquirer" (C.T. 89), and, as editor, to "oversee the whole editorial process" (C.T. 90), which latter function encompassed, of course, specific approval for publication of the Article, the final page proof of which he saw and approved. (C.T. 94).[5] Calder also personally made the decision not to retract the Article after Appellees' demand that he do so. (C.T. 95-96).

South's other contacts with California were significant. His by-line appeared on the Article (C.T. 6) which he was primarily responsible for concocting. (C.T. 142-147). In conducting his "investigation" of the Article, he had several telephone conversations with persons in California, including more than one with an acknowledged "source" for the Article, and personal friend, Jane Chesis, (C.T. 150, 157-158, 165); he was provided with at least five California telephone numbers of persons who could provide him with

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[3]This is apparently the telephone conversation which Appellants characterize as "a single telephone call to one Appellee" (Statement, p. 16), without alluding to the fact that this call, even without subsequent publication of the Article, constituted commission of the tort of intentional infliction of emotional distress in California. *Moore v. Green*, 431 F. 2d 584 (9th Cir. 1970).

[4]This publication led to initiation of this lawsuit on November 20, 1979, by Appellees against Appellants, the Enquirer and Sunset News Company (the Enquirer's California distributor) for libel, invasion of privacy and intentional infliction of emotional distress. (C.T. 1-7).

[5]Appellants minimize these crucial management and supervisorial functions characterizing them as "routine editorial services." (Statement, p. 4).

information about Appellees (C.T. 139-140), which numbers one can infer he called; he had at least twenty (20) telephone conversations with John Robert Lucas, another reputed California "source" for the Article (C.T. 147-148) in the year preceding publication of the Article (C.T. 107);[6] and he had at least six (6) meetings in California with Lucas, at least two of which meetings were prior to publication of the Article for which Lucas was a primary source. (C.T. 101-102; 104-105).

Based upon the detailed deposition abstracts presented below, even the trial court, which ruled against Appellees, was forced to conclude:

> "In addition, it may fairly be inferred from the record before the Court that Reporter South visited California at least once for purposes relating to the article." (Statement, Appendix C, Opinion of Superior Court, p. 16a).

The Court of Appeal reviewing the record reached the same conclusion:

> "The record shows that he [South] gathered information appearing in the allegedly defamatory article in the course of at least one visit made by him to California . . ." (Statement, Appendix A; Opinion and Judgment of the California Court of Appeal, p. 9a).

Despite the clear evidence from which the legitimate inference of South's visit to California related to the Article could be drawn, Appellants characterize this factual finding as "hypothesized." (Statement, p. 5, n. 6; p. 7; p. 16, n. 15). Appellants' contention that South's affidavit (stating he did not travel to California) was not countered by the evidence (Statement, p. 5, n. 6; p. 16, n. 15), is ironic indeed. The inference from the deposition testimony was strong enough to rebut it. Further, the only reason even stronger evidence was not presented was because inquiry

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[6]Appellants, with no support in the record or in South's Declaration (Statement, p. 25a), arbitrarily state that there were only three investigation related telephone calls to California. (Statement, pp. 5, 16). In fact, the evidence suggests there were many more.

as to whether the meetings with Lucas related to the subject Article was precluded by Appellants' counsel's objection and instruction not to answer that information on grounds of a claimed newsman's source privilege. (C.T. 105-106).

In addition to the Article related contacts, South had other significant contacts with California. In the four years prior to publication, he made between twenty (20) and forty four (44) trips to California on Enquirer business averaging one to two weeks (C.T. 102-103),[7] and on one such trip he sought alternative employment in California since "he had to travel so much out here, it would give him more time with his children if he obtained employment here." (C.T. 155). On another trip to California, after publication of the subject article, South met with Jane Chesis to discuss her deposition in this lawsuit. (C.T. 130-131). South also had a dozen business acquaintances in California unrelated to Enquirer business (C.T. 103), clearly suggesting his business dealings with that state.[8]

Though Respondents have no knowledge of Calder's personal appearances in California in connection with this matter, he was in personal attendance during virtually the duration of the trial in the matter of *Carol Burnett v. National Enquirer, Inc.*, Los Angeles Superior Court No. C157213 (C.T. 261), during March, 1981, demonstrating both his knowledge that articles relating to celebrities in California would likely lead to litigation there and the relative convenience of his defending an action in that forum.

Noticeably absent from the Statement are the critical facts which distinguish this case from others: the presence of wrongful conduct which is alleged to be willful, malicious and intentional (C.T. 1-5), and the consequences of which were knowingly directed at California and therefore fore-

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[7] Appellants fail to advert in their Statement to the outer limit figure of forty four, which the evidence supports, nor to the average one to two week duration of the trips. (Statement, p. 5).

[8] This tends to negate the conclusory statement in South's declaration that he never engaged in any business activity in California in his personal capacity (Statement, Appendix F, Affidavit of South, p. 25a).

seeably related to that state. It was completely foreseeable that Appellants would be called upon to defend this case in California, where they knew Appellees resided (C.T. 171), where they knew the subject of the Article (Appellees' professional endeavors) was located, where the Enquirer's largest circulation in any state occurred (in excess of 500,000 copies per issue (C.T. 110-122)), and where they knew other lawsuits by celebrities had been filed.

IV.
STATEMENT OF THE CASE.

A. The Superior Court.

The trial court agreed with appellees that application of traditional jurisdictional principles would clearly subject Appellants to jurisdiction. It stated:

> "Indeed, if the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. *Buckeye Boiler v. Superior Court*, 71 Cal. 2d 893 (1969)." (C.T. 527) (Statement, Appendix C, Opinion of Superior Court, p. 17a).

However, the trial court did not conclude its analysis at this juncture, but rather continued:

> "The question presented by this case is whether further consideration is required because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher . . . . The question becomes, then, whether, in assessing the fundamental fairness of the proposed assertion of jurisdiction, the Court should weigh and consider additional factors in cases where freedom of the press is involved." (C.T. 527-528) (Statement, Appendix C, Opinion of the Superior Court, p. 17a).

Only after according Appellants this unwarranted special First Amendment consideration did the trial court conclude that it could not exert jurisdiction.

B. The California Court of Appeal.

The California Court of Appeal, Second District, Division One, in a cogent, unanimous opinion agreed with the trial court that traditional jurisdictional analysis justified jurisdiction over Appellants.[9] However, relying on the uncontradicted California authority and the clear and overwhelming weight of authority in other jurisdictions, it rejected the trial court's conclusion (CT. 527-528) that there was some special jurisdictional preference required in a "First Amendment case." Rather, the Court of Appeal concluded that First Amendment considerations are better dealt with in the context of the substantive law (as this Court has done in *New York Times v. Sullivan*, 376 U.S. 265 (1964) and its progeny) and not in connection with unrelated procedural issues. (Statement, Appendix A, Opinion of the California Court of Appeal, p. 4a). Relying on the California case of *Sipple v. Des Moines Register and Tribune Co.*, 82 Cal. App. 3d 143, 148-150, 147 Cal. Rptr. 59 (1978) and decisions of several circuit courts including the Ninth Circuit, particularly *Church of Scientology of California v. Adams*, 584 F. 2d 893, 899 (9th Cir. 1978), it concluded that jurisdiction over South and Calder "must be determined in accord with traditional principles unaffected by First Amendment considerations." (Statement, Appendix A, Opinion of California Court of Appeal, p. 5a).

In applying these traditional principles, the Court of Appeal acknowledged that "[e]very state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere. (See, Rest. 2d Conf. of Laws, §37, com. a.). . . . [¶] If a defendant commits an act or omission outside the forum state *with the intent* to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. *The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of*

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[9]This opinion was published and reported at 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (1982).

in personam jurisdiction." (Statement, Appendix A, Opinion of California Court of Appeal, p. 7a) (emphasis in original). The tortious effects caused by Appellants in California were alone sufficient to justify jurisdiction over them, though South's contacts were sufficient to impose jurisdiction over him even without resort to the "intentional effects" principle. (Statement, Appendix A, Opinion of California Court of Appeal, p. 9a).

The Court of Appeal concluded that jurisdiction over South and Calder was not affected by the fact that they intentionally engaged in the wrongful and malicious conduct in the course of their employment with the Enquirer. Such employment provided them no immunity for their intentional wrongdoing, since:

> " '[T]he general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. [citation]. And even if appellant could somehow avoid liability for his acts for [the publisher], it would not follow that jurisdiction could not be maintained based upon those acts. Thus, it seems clear that appellant's status as the author instead of the publisher does not create a legal distinction invalidating jurisdiction over him. [citations].' " (Statement, Appendix A, Opinion of California Court of Appeal, p. 11a).

Only after establishing that Appellants had the requisite minimum contacts with California so as to justify exercise of jurisdiction did the court balance the possible inconvenience to them against plaintiff's interests in suing in California, and conclude that California was a proper place for jurisdiction. (Statement, Appendix A, Opinion of California Court of Appeal, p. 11a).

C. The California Supreme Court.

The California Supreme Court denied hearing (Statement, Appendix B) signifying under California Rules of Court, Rule 29 that a hearing did not appear "necessary to secure uniformity of decision or the settlement of important questions of law."

V.

THE ISSUES PRESENTED, IN LIGHT OF ALL OF THE FACTS AND THE PROCEDURAL POSTURE OF THIS CASE, REVEAL THAT NO SUBSTANTIAL FEDERAL QUESTION EXISTS TO REQUIRE THIS COURT'S REVIEW.

The issues raised below are not as Appellants characterize them, and they are not substantial enough to warrant examination by this Court. Simply stated, they are:

1. Must a special First Amendment jurisdictional privilege be accorded to members of the press who engage in intentionally tortious conduct outside of California which conduct results in sending into California a product which causes injury there?[10]

2. Can significant participants in wrongdoing outside of California aimed at residents of that state evade jurisdiction simply because the intentional wrongdoing was accomplished while working for a corporate employer?

VI.

THE CREATION OF A JURISDICTIONAL PREFERENCE ALLOWING MEMBERS OF THE MEDIA TO EVADE STATE JURISDICTION BASED ON THEIR PARTICIPATION IN INTENTIONAL AND MALICIOUS CONDUCT DIRECTED AT STATE RESIDENTS IS NOT A SIGNIFICANT ISSUE DIVIDING THE COURTS.

Appellants urge that there is significant conflict among the federal circuit courts on whether it is *improper* to consider the First Amendment in jurisdictional analysis,[11] and that this Court should adopt a special jurisdictional preference for non-resident members of the media.[12] However, the alleged "widening" split of authority (Statement, p. 9)

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[10]Appellants characterize this issue as whether it is *improper* to give weight to the First Amendment in jurisdictional analyses. However, since the California Court of Appeal has ruled that it chooses not to give such special First Amendment weight, only if the Constitution requires that special treatment *must* be accorded can the California Court of Appeal be reversed.

[11]See n. 10, *supra*.

[12]Appellants do not indicate whether they would reserve this special treatment for the institutional press, all publishers, reporters or anyone exercising a First Amendment right.

is more apparent than real and is created only by Appellants' overzealous efforts to convince this Court that a basis for its appellate jurisdiction exists.

A. United States Supreme Court Precedent.

This Court has never held nor remotely suggested that defendants in libel cases must be accorded a special jurisdictional preference. In contrast, this Court has gone far in protecting the press and other defamation defendants by means of significant protections incorporated in the substantive constitutional law of libel (See, *New York Times v. Sullivan, supra; Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). These cases reflect the wise determination that First Amendment issues are best directly confronted in consideration of the substantive law of libel rather than by indirection in jurisdictional or other procedural analyses. Furthermore, this Court's decisions in the substantive law of libel have achieved a fine balance of interests amply protecting libel defendants. Additional procedural protections would upset this balance and is otherwise unwarranted and unneeded.

Chief Justice Burger in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (concurring opinion) reflected the reluctance to elevate the press into a privileged institution where not otherwise warranted. He stated:

> " '[T]he purpose of the Constitution was not to erect the press into a privileged institution' . . . the liberty of the press is no greater and no less '. . . than the liberty of every citizen of the Republic [citation omitted]' "

Although stated in connection with the freedom to publish, the granting of unwarranted privilege to the press is equally applicable to a jurisdictional privilege.

B. This Issue Is Marked by a Uniformity of Judicial Opinion.

It is only by counting the opinions of federal district courts as those of the circuit in which they sit (Statement, pp. 10-12) that Appellants can make their exaggerated

claims of a clear split of authority among the federal circuits on the existence of a special jurisdictional preference in First Amendment cases.

In fact, however, a careful review of Appellants' authorities makes clear that the sole source of such authority among the federal circuit courts of appeal is the Fifth Circuit prior to its recent division. *See, e. g., Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964); *New York Times v. Connor*, 365 F.2d 567 (5th Cir. 1966); *Wolfson v. Houston Post Co.*, 441 F.2d 735 (5th Cir. 1971); *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975) and *Cox Enterprises, Inc. v. Holt*, 678 F.2d 936 (11th Cir. 1982).[13]

Although they suggest that "The Fifth, Eleventh, and *D.C. Circuits* hold . . ." (Statement, p. 10, emphasis added) that First Amendment considerations are required in jurisdictional analysis, Appellants cite no D.C. Circuit court case holding to that effect.[14] The balance of federal cases cited are all district court cases[15] which contain occasional language to similar effect in otherwise inapposite opinions. *See, e.g., McCabe v. Kevin Jenkins and Associates, Inc.*, 531 F. Supp. 648 (E.D.Pa. 1982).[16] *Margoles v. Johns*, 333 F. Supp. 942 (D.D.C. 1971), aff'd. 483 F. 2d 1212 (D.C. Cir. 1973);[17] and the unpublished slip opinion in *Gonzales v. Atlanta Constitution, supra.*[18]

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[13]Appellants seek to benefit by the recent creation of the Eleventh Circuit out of the Fifth, apparently hoping that the divison of circuits will create a multiplicity of authority, despite the fact that the *Cox* court considered itself bound by "applicable law previously developed in the former Fifth Circuit." 678 F.2d at 937.

[14]The D.C. Circuit case of *Margoles v. Johns*, 483 F. 2d 1212 (D.D.C. 1971), upon which Appellants apparently rely for this assertion, does not so much as comment on whether the First Amendment affects jurisdictional analysis.

[15]At least one of these was not even officially reported. *Gonzalez v. Atlanta Constitution*, 4 Media L. Rptr. 2146 (N.D. Ill. 1979).

[16]This case turns on the long arm statute of Pennsylvania and substantially lesser contacts.

[17]The *Margoles* case was decided as a matter of interpretation of a Washington, D.C. long-arm statute which was not as broad as California's and at any rate its favorable reference to *N.Y. Times v. O'Connor, supra*, was not commented upon nor referred to by the circuit court opinion.

[18]This unpublished district court opinion relies without analysis on the much discredited *Connor* case.

Even the only federal circuit embracing this special jurisdictional preference, the Fifth (and its successor the Eleventh), has qualified its significance. *Curtis Publishing Co. v. Golino*, 383 F.2d 586, 590-591 (5th Cir. 1967), distinguishing *New York Times v. Connor, supra*, limiting it to newspapers and asserting its inapplicability to magazines. *Edwards v. Associated Press*, 512 F. 2d 258, 266 (5th Cir. 1975), said that *Connor* "indicates not so much a rule as it expresses a cautionary note." *Edwards* further acknowledged that Connor "has not been greeted with enthusiasm" (512 F. 2d at p. 266, n. 29) citing *Buckley v. New York Post Corporation*, 373 F. 2d 175 (2d Cir. 1967) in support of that proposition.[19]

In fact, in *David v. National Lampoon*, 432 F. Supp. 1097, 1100 (D.S.C. 1977), a district court case within the Fourth Circuit, the Court properly disregarded the *Connor* cautionary note:

> "This court can see no real legal distinction between a publisher who causes a publication which allegedly harmed the plaintiff to be distributed in the state and a manufacturer who ships an allegedly defective product into the state."

This is so because the principles of long arm jurisdiction set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and subsequent cases are:

> ". . . equally applicable whether the alleged potential for harm is latently concealed in a household appliance, a can of food or a printed page. All are different types of products capable of producing different types of harm, but all are identical for purposes of jurisdictional analysis." 432 F. Supp. at 1100.

Finally, the only commentators Appellants cite in support of its claim, Weinstein and Leflar (Statement, p. 11, fn. 12), wrote prior to *New York Times v. Sullivan, supra*, and

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[19]Significantly, Appellants' count *Buckley* among its number of supporting circuits though the Fifth Circuit itself was aware of *Buckley's* critical view of *New York Times v. Connor* position.

thus before this Court accorded additional First Amendment protection to defendants in libel cases.

Weighed against Appellants' scant and inapposite federal authority, Appellees' federal authorities which rightly criticize the Fifth Circuit cases cited above are impressive in scope and logic. *See, Church of Scientology of California v. Adams*, 584 F. 2d 893, 899 (9th Cir. 1978), (where the court observed that the proposition that there is increased protection from jurisdiction in First Amendment cases is one whose ". . . soundness is opened to question. . . . We observe that First Amendment protections are better developed in the context of substantive defenses on the merits rather than at the initial jurisdictional stage of a defamation proceeding"); *Anselmi v. Denver Post*, 552 F. 2d 316, 324 (10th Cir. 1977) (which after citing *Buckley v. New York Post*, 373 F. 2d 175, 182 (2d Cir. 1967), stated: "Whether there is a First Amendment defense is to be determined when the case is tried and ought not as a matter of reason and logic affect the outcome of a personal jurisdiction questions such as we have here. . . . To hold as did the Fifth Circuit that the First Amendment has to be thrown on the scales as an added impediment in media cases gives to the media an additional arrow which is not appropriate in a determination as to whether the contacts are legally sufficient to constitute due process"); *Buckley v. New York Post, supra*, (where Judge Friendly pointedly observed: "We cannot but wonder whether the *Connor* court would have felt the same way if the *dramatis personae*, instead of being "Bull" Connor and a newspaper internationally known for its high standards, had been an esteemed local educator of clergyman and *an out-of-State journal with a taste for scandal* which had circulated 395 copies of a libel stating he had corrupted the morals of the young" (emphasis added)); *Johnstone v. Time, Inc.*, 321 F. Supp. 837, 846 (D.N.C. 1970) (court considered the changes to substantive defamation law made in *New York Times v. Sullivan* and stated: "Therefore, the necessity of granting the First Amendment a weighty consideration in the determination of whether a certain forum has jurisdiction over a defendant publisher is

not as great . . ."); *Cordell v. Detective Publications, Inc.*, 307 F. Supp. 1212, 1216 (E.D. Tenn. 1968), (which after discussing *New York Times v. Connor, supra*, stated: "The court is of the opinion that a better approach to this problem is set forth in the opinion of the Court of Appeals for the Second Circuit in *Buckley v. New York Post* (C.A. 2, 1967), 373 F. 2d 175. Judge Friendly in that case reasoned that the free press considerations could best be effectuated by divorcing them from problems of due process under the Fourteenth Amendment"); *Novel v. Garrison*, 294 F. Supp. 825, 833 (N.D. Ill. 1969), ("[t]he soundness of applying these First Amendment considerations to jurisdiction questions has been questioned."); *David v. National Lampoon, Inc.*, 432 F. Supp. 1097 (D.S.C. 1977); *see, also, Long-Arm Jurisdiction Over Publishers: "To Chill A Mocking Word"*, 67 Colum. L. Rev. 342 (1967); "*Due Process In First Amendment Considerations In Libel Cases*," 52 Iowa L. Rev. 1034 (1967); and, "*Constitution Limitations To Long-Arm Jurisdiction In Newspaper Libel Cases*, 34 U. Chi. L. Rev. 436 (1967).

C. Even if a First Amendment Jurisdictional Preference Were Required, Appellants Would Be Subject to Jurisdiction Based Upon Their Intentional Wrongdoing.

Even if a higher jurisdictional standard of analysis is applicable in libel cases, that higher standard would be satisfied at bar, since:

(a) Appellants acted knowing the Enquirer has significant circulation in California (*Buckley v. New York Post Corporation, supra*);

(b) Appellants acted knowing the defamatory and invasive article was directed specifically to California readers through the Enquirer's extensive California distribution (*Edwards v. Associated Press, supra*);

(c) The article was of such particular interest in California that it was at least foreseeable and probably intended that it would be given substantial attention

there (*Edwards v. Associated Press, supra, Anselmi v. Denver Post, Inc., supra*);

(d) The Enquirer is a magazine (C.T. 244-256) rather than a newspaper and thus Appellants are not subject to the same "chilling effects" from periodic lawsuits. (*Curtis Publishing Co. v. Golino, supra*, at 592-3); and

(e) Appellants, and particularly South, had significant and substantial contacts with California; (*McGuire v. Brightman*, 79 Cal.App.3d 776, 145 Cal. Rptr. 256 (1978)).

Thus, even if the issue of whether the news media are entitled to a special First Amendment jurisdictional preference were a substantial one, which it is not, or was in conflict among the federal circuits courts, which it is not, the resolution of that issue either way would not and should not affect the outcome in this matter.

VII.

THE CALIFORNIA COURT OF APPEAL'S HOLDING THAT SIGNIFICANT OUT-OF-STATE PARTICIPANTS IN INTENTIONALLY WRONGFUL CONDUCT HAVING INJURIOUS EFFECTS ON RESIDENTS OF CALIFORNIA ARE NOT JURISDICTIONALLY IMMUNE BECAUSE THEIR WRONGFUL CONDUCT WAS DONE WHILE WORKING FOR A CORPORATE EMPLOYER PRESENTS NO NOVEL OR SIGNIFICANT ISSUE FOR THIS COURT.

Appellants contend "that personal jurisdiction over a corporation does not carry with it personal jurisdiction over individual out-of-state employees." (Statement, p. 15). However, neither Appellees nor the California Court of Appeal suggests that jurisdiction over an out-of-state corporation automatically includes jurisdiction over its employees regardless of their individual connection with the forum state. Were that the real issue, Appellees acknowledge that serious due process questions might arise. However, the correct issue presented and resolved by the California Court of Appeal is simply whether because one is an employee of a corporation, one is automatically insulated from jurisdiction even for intentionally wrongful

acts actually done by him, albeit on behalf of his corporate employer.

On this issue, Appellants' authorities are not supportive. Most emanate from New York or from jurisdictions containing long arm statutes much narrower than California's with a shorter reach than that permissible under the Fourteenth Amendment. Furthermore, logic suggests that the existence of a jurisdictional "fiduciary shield" for corporate employees is simply a matter of state law presenting no constitutional dimensions whatever. If a defendant's contacts with a forum render it fair to subject him to jurisdiction, it is unclear why those same acts done on behalf of a corporate employer should then become an unfair basis of jurisdiction. This is particularly so when the acts constitute intentional wrongdoing.

Appellants primarily rely on *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981), *Grove Press, Inc. v. CIA*, 483 F. Supp. 132, 135 (S.D.N.Y 1980); and *Marine Midland Bank v. Miller*, 664 F. 2d 899, 903 (2d Cir. 1981), which appear to articulate a "fiduciary shield" doctrine shielding officers and employees from jurisdiction based upon acts which they performed in their corporate capacity. However, as stated in *Marine Midland Bank, supra*, and as suggested in logic, that doctrine:

> "is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long arm statute [of New York]." 664 F. 2d at 902, footnote 3.

Since the reach of California's long-arm statute is coextensive with constitutional limits, it does not impose such a restriction.

The suggestion of Appellants that the California Court of Appeal explicitly recognized (Statement, p. 10a) that in permitting personal jurisdiction over an out-of-state employee for acts done outside the state for the corporate employer, its holding conflicts with that of the Ninth Circuit in *Forsythe v. Overmeyer*, 576 F. 2d 779 (9th Cir.) cert. den., 439 U.S. 864 (1978) (Statement, p. 13), could not

be more inaccurate. First, the California Court of Appeal in its discussion of jurisdiction over corporate employees, merely referenced *Forsythe* by the use of the signal "See also," suggesting only that that case said something on this point while not recognizing any explicit or tacit conflict with the position it was taking.[20] Furthermore, the language in *Forsythe*, suggesting the proposition for which Appellants cite it, is mere dictum and not as they characterize it, a "holding."[21] Additionally, *Forsythe* dealt with an issue of whether an obligor on a personal guaranty was subject to jurisdiction, a totally different nontortious matter than that presented at bar, where an employee's significant, direct and voluntary participation in intentional tortious conduct outside of a state aimed therein is alleged.[22] Finally, in support of the proposition under discussion *Forsythe* cites only the one-half (½) page opinion of *Chem-Lab Products, Inc. v. Stepanik*, 554 F. 2d 371 (9th Cir. 1977),[23] which case found no "personal acts" with California, making clear that personal acts meant contact with California on behalf of a corporation or otherwise.

Other federal cases cited by Appellants are equally inapposite. For example, *Idaho Potato Commission v. Washington Potato Commission*, 410 F. Supp. 171 (D. Ida. 1975), relies primarily on the New York authorities, which as above stated recognize the fiduciary shield as a matter of statutory construction; *Stop-A-Flat Corp. v. Electra Start of Michigan, Inc.*, 507 F. Supp. 647 (E. D. Pa. 1981),

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[20]According to the standard reference "A Uniform System of Citation", Rule 2:3 (Harv. L. Rev. Assoc. 12th Ed., 1976), the signal "See also" indicates that the "Cited Authority provides background to a question analogous to that examined in text, which can profitably be compared with it."

[21]"*Moreover*, a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum [citation omitted]" 576 F. 2d at 783-784 (Emphasis added).

[22]This is of course the very significant fact that Appellants have ignored throughout their Statement.

[23]Appellants heavily rely on this case only after misstating the proposition for which it stands.

relies primarily upon a case considering a long arm provision substantially narrower than California's; *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F. 2d 902 (1st Cir. 1980), a non-intentional tort case based upon a narrower Puerto Rican statute providing jurisdiction if "(1) Such person or his agent carries out business transactions within Puerto Rico"; *Weller v. Cromwell Oil Co.*, 504 F. 2d 927 (6th Cir. 1974), a case of construction of Ohio's long arm statute rather than constitutional interpretation: "In this appeal, we construe Ohio's long arm statute . . . (at p. 928) and "we are not willing to extend the Ohio long-arm statute to cover this case." (at p. 931.) At any rate its statement with regard to employees' susceptibility to jurisdiction for acts done on behalf of a corporate employer was only dictum; *Wilshire Oil Co. of Texas v. Riffe*, 409 F. 2d 1277 (10th Cir. 1969), a suit by a corporation against *its own former employees* related to their acts when employed, also relied on New York cases, dealt with a narrower long arm statute than California and was only dictum saying, "nonetheless, we do not deem it necessary to decide the matter solely on that basis [fiduciary shield]" instead, finding inherent weakness in the defendants' contacts with the forum and the connection of those contacts with the cause of action.

Those opinions cited by Appellants which might fairly support a claim of due process jurisdictional immunity for intentional tortious activity conducted in the course of one's corporate employment are simply wrong for the reasons above discussed.[24]

The only California state court decision dealing with this issue is *Quattrone v. Superior Court*, 44 Cal. App. 3d 296, 118 Cal. Rptr. 548 (1975), where a non-resident individual defendant was subjected to California jurisdiction though all of his acts were performed outside of that state on behalf of a Pennsylvania corporation.

The California Court of Appeal, in its opinion below, cited Judge Becker's reasoned discussion of the anomaly

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[24]*See, State Security Ins. Co. v. Frank B. Hall, Inc.*, 530 F. Supp. 94 (N.D. Ill. 1981).

presented by the corporate shield doctrine in *Donner v. Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1233 (E. D. Pa. 1979). It would make no sense for state policy to subject an employee to liability for his intentional wrongful acts on behalf of his employer, while at the same time according him a jurisdictional immunity making it easier for him to evade answering for those very acts. For other criticism of the corporate shield doctrine, *See, Lighting Systems, Inc. v. International Merchandising, Inc.*, 464 F. Supp. 601 (W. D. Pa. 1979); *Leshko v. Don-Oliver, Inc.*, 86 F.R.D. 343 (M. D. Pa. 1979); and *McGuire v. Brightman*, 79 Cal. App. 3d 776 (1978) (subjecting the individual defendant to jurisdiction though he at all times acted for his corporate employer). At most it can be said that the fiduciary shield doctrine is a matter of state law and policy and hardly a constitutional mandate.

VIII.

APPELLANTS' INTENTIONAL ACTS WHICH LED TO THE INJURY OF APPELLEES ARE SUFFICIENT TO WARRANT JURISDICTION IN CALIFORNIA.

As set forth in the Rest. 2d Conf. of Law §37, com. a:

> "If a defendant commits an act or omission outside the forum state with the intent to cause a tortious effect within the state, the state may exercise jurisdiction as to any cause of action arising from the effects. The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction."

At bar, the facts are more compelling since it was unavoidable that the out of state acts of Appellants would cause an effect in California. The largest number of copies of the defamatory item were expected to be distributed in California and it was known that Appellees resided in California. The harmful effects of Appellants' acts were the very effects desired. This element of foreseeability of the injury caused has been frequently determined to be a key ingredient in asserting jurisdiction based upon the effects of tortious conduct. *See, e.g., Novel v. Garrison*, 294 F. Supp. 825 (N. D. Ill. 1969); *Pegler v. Ed Sullivan*, 432 P. 2d 593 (Ariz.

App. 1967); *Church of Scientology v. Adams*, 584 F. 2d 893 (9th Cir. 1978).

Furthermore, there is no unfairness in subjecting such intentional participants in wrongdoing from jurisdiction in the very state where it was known and foreseen that the injury would occur, particularly since many states find that tortious effects alone, even unintentionally caused, may be sufficient. *See, e.g., Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.W. 2d 761 (1961); *McBride v. Owens*, 454 F. Supp. 731 (S.D. Tex. 1978); *Western Desert, Inc. v. Chase Resources Corp.*, 460 F. Supp. 63, 65 (N.D. Tex. 1978) (Vernon's Ann. Tex. Civ. St. Art. 2031b); *David v. National Lampoon, supra* (S.C. Code §10.2-803); *Cole v. Doe*, 77 Mich. App. 138 (1978) (Mich. Stat. Ann. §27A. 705).

IX.
CONCLUSION.

In the *New York Times v. Sullivan, supra*, line of cases, the media claimed that being held responsible for defamation without according due deference to the First Amendment would chill their speech. This court then properly adjusted the substantive law of libel to balance the interests of defamed individuals and the media.

Now Appellants come to this court claiming that merely having to respond to defamation lawsuits in a forum where they themselves choose to cause injury would chill their speech. This is of course only the precursor to a claim that having to defend such lawsuits anywhere has a chilling impact on the media.

However, whatever mild chill may be occasioned in this case there is no jurisdictional immunity for publication of defamatory falsehoods mandated by the federal constitution which could or should permit Appellants to avoid California's jurisdiction. Since this issue has been properly resolved

(c) The article was of such particular interest in California that it was at least foreseeable and probably intended that it would be given substantial attention there (*Edwards v. Associated Press, supra, Anselmi v. Denver Post, Inc., supra*);

Dated: March 21, 1983.

Respectfully submitted,

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APPENDIX A.

Husband's Bizarre Behavior Is Driving Shirley Jones to Drink

Shirley Jones' husband, Marty Ingels, is acting like a crazy man — and Shirley has been driven to drink by his bizarre behavior, insiders say.

They also reveal that Ingels — a producer of TV commercials — has terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood.

Sadly, they charge that it's gotten so bad that Shirley is barely able to make it through the day. And millions of fans of her new TV show, "Shirley," don't realize that the seemingly bubbly star is really crying on the inside.

'By 3 in the Afternoon She's a Crying Drunk'

"Marty Ingels has driven Shirley to drink," charged an inside source who visited the set and spoke with crew members.

"She pours down vodka so fast that at first the crew thought she was drinking water.

"She starts blurring her lines and by 3 o'clock in the afternoon she's a crying drunk and they have to stop shooting."

Shirley — one of the most beloved performers in Hollywood is hitting the bottle "because of the pressure Marty's putting on her to sign over her home to him and to let him take her teenage son, Patrick Cassidy, into show business," the source told The ENQUIRER.

"Every day Ingels calls her on the set and they have screaming fights over the phone. The other day she was shouting, 'Leave Patrick alone. I want him to go to school and make something of himself — I don't want him to be a teenage idol!' "

Former staffers say Ingels, who brags about owning seven guns, has even gone so far as to threaten them with violence.

"When I argued with him he told me I'd never walk the face of the earth again," confided one frightened former employee. "He told me he was going to blow up my face. Once I even had to call my attorney because I thought he was going to come over and kill me. The guy is a crazy person."

(PHOTOGRAPH DELETED)

HITTING THE BOOZE: Shirley drinks because of the pressure that husband Marty Ingels — pictured with her here — puts on her, says an insider. "The man is a maniac," says one producer.

Said another: "He still owes me a lot of money. He promises he'll make it up to you — but he never does. Instead, he hires and fires so he won't have to pay."

Though Ingels is only a minor producer of commercials, he has one of the most notorious casting couches in all of Hollywood.

"I was furious to find that I was the victim of a classic casting couch routine," complained one young would-be actress.

"He told me I could have the part in a movie he said he was doing if I would go to bed with him — I told him to go jump in the lake."

Even established stars are beginning to feel as if they, too, have been dragged over the famous couch.

"Steve Allen, Gary Burghoff and Esther Rolle were all going to sue him over appearances in a TV program for the Lutheran Church," recalled one insider. "The church paid Ingels $60,000 — but he only passed on $30,000 to the stars."

Shocked and hurt by the obvious rip-off attempt, Allen wrote a personal letter to Ingels which read, in part: "Marty, I can't believe that anybody in the industry — and especially a contemporary — would try to nail three peers in a thing like this." The suit was eventually settled out of court.

Ingels' raging tantrums and foul mouth seem to know no bounds. For example, he once alienated the president of the Pillsbury Co. with a vulgar, four-letter blast over the phone, according to a former associate.

People who have worked closely with Ingels are throwing up their hands in despair.

"The man is sick and he's hurting my industry," fumed producer Lloyd Kolmer. "I try to reason with him but he rants and raves and then sends me threats. The man is a maniac!"

When asked by The ENQUIRER about the charges, Ingels replied: "Of course, none of it is true" — but he admitted that he was "flattered" by all the attention.

— JOHN SOUTH